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No. 94-490

In The

Supreme Court of the United States

October Term, 1994

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

vs.

RALPH P. FORBES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Respondent, Mr. Forbes, takes issue with the Petitioner's Statement of the Case wherein the Petitioner (Arkansas Educational Television Communications Network ("AETC")) mischaracterizes decisions of the United States Court of Appeals for the Eighth Circuit relevant to this case as well as the Eleventh Circuit's opinion in *Chandler v. Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, __U.S.__, 112 S. Ct. 71 (1991). In its brief, AETC states that the Eighth Circuit disagreed with the Eleventh Circuit's *Chandler* decision "which found no First Amendment right of access in a closely similar factual situation." (Petition for Cert., p. 6). However, Mr. Forbes submits that to the extent the Eighth Circuit's decision in this case differs from the Eleventh Circuit's decision in *Chandler,* that difference is due primarily to factual and procedural distinctions between the cases rather than any substantive disagreement between the circuits in their construction and application of relevant case law.

SUMMARY OF ARGUMENT

Mr. Forbes will demonstrate that the decision of the Eighth Circuit below is consistent with the precedent of this Court and that no conflict of jurisprudence exists between the Eighth Circuit and the Eleventh Circuit. Mr. Forbes will also show that the Eighth Circuit's decision below furthers the fundamental public policy that lies at the very heart of our Bill of Rights, that is, a free and open exchange of ideas and information among the electorate, as it is implemented in the drastically different society and technology of today.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT'S RULING BELOW IS MUCH NARROWER THAN IS SUGGESTED BY THE PETITIONER.

In its brief, AETC asserts that the Eighth Circuit's decision will open the proverbial "floodgate" to citizen litigation against publicly-owned broadcasters for *every* programming decision, regardless of program content. Alternatively and in an equally apocalyptic tone, AETC argues that the Eighth Circuit's decision will cause publicly-owned broadcasters to simply choose not to broadcast *any* political debates in the future either for fear of litigation or because of restricted editorial autonomy.

Since the case came before the court on AETC's motion to dismiss, it is important to note the procedural standards to be applied in deciding that motion. The district court properly set forth the applicable legal standards favoring Mr. Forbes' complaint:

> A Rule 12(b) motion is to be read as a whole, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), and it is to be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief."
>
> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983). In addition, complaints are to be "liberally construed in favor of the plaintiff." *See Jenkins v. McKeithen*, 395 U.S. 411, 421

> (1969), and *United States v. Advance Machine Corp.*, 547 F. Supp. 1085, 1088 (D. Minn. 1982). It has also been said that all facts pleaded in the complaint are taken to be true for 12(b)(6) purposes, *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 740 (1976), and all reasonable inferences from facts pleaded in the complaint are to be drawn and deemed to be true. *See* Wright & Miller, *Federal Practice and Procedure* § 1363 (1969).

Petition for Cert. at 40a. AETC does not challenge this aspect of the lower court's decision.

If left intact, the Eighth Circuit's decision accepts as true Mr. Forbes' allegations, secures to him First Amendment rights and does nothing more than require AETC to file an answer and allow Mr. Forbes the opportunity to have a trial on the merits. Furthermore, it allows AETC the opportunity to justify its actions by meeting its comparatively low burden of constitutional justification for excluding Mr. Forbes from the televised debate.[1]

The Eighth Circuit's decision does *not* create a *per se* rule of mandatory inclusion for political candidates in televised debates, and it certainly does *not* restrict the FCC's existing authority under the Federal Communications Act. Nor does its decision place upon publicly-owned broadcasters any burdens to which they are not already subject.

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1. While absent here, all of these factual and procedural steps had already occurred in *Chandler, infra, before* the Eleventh Circuit received that case for argument and decision.

II.

THE CONSTITUTIONAL PROTECTION OF THE FIRST AMENDMENT IS INDEPENDENT OF AND SUPERIOR TO THE STATUTORY PROTECTION AFFORDED UNDER SECTION 315 OF THE FEDERAL COMMUNICATIONS ACT.

Due to AETC's status as a state actor, acts or omissions involving its employees and representatives are attributable to the State and subject to First and Fourteenth Amendment scrutiny. *DeYoung v. Patten*, 898 F.2d 628, 631-32 (8th Cir. 1990) (*citing Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2753 (1982)). The constitutional scrutiny to which public television stations as extensions of the State are subject is more strict than the scrutiny given to actions taken by privately-owned broadcasters. *United States v. Kokinda*, 110 S. Ct. 3115 (1991).

The Federal Communications Commission ("FCC") has been allowed almost unfettered discretion in the area of statutory interpretation of the Federal Communications Act[2] for both public and private broadcasters. However, the Eighth Circuit properly reserved the instant dispute unto the judicial branch because constitutional issues are at stake. Stated differently, according to the Eighth Circuit, the FCC does *not* have primary jurisdiction to resolve direct First and Fourteenth Amendment disputes between the citizenry and publicly-owned broadcasters. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969). ("[T]he right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences . . . may not constitutionally be abridged either by Congress or by the FCC.").

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2. 42 U.S.C. §§ 153(h), 309(a), 312(a)(7), 315(a), and 402(a) (1988), *et seq.*

In its opinion, the Eighth Circuit expressly overruled its earlier decision in *DeYoung v. Patten*, *supra*, to the extent that *DeYoung* held that a political candidate had no First Amendment right to appear in a televised debate beyond that given by Section 315 of the Federal Communications Act. *Ralph Forbes v. Arkansas Educational Television Communication Network Foundation (AETN)*, 22 F.3d 1423, 1428 (8th Cir. 1994) (No. 93-1031WA). Petition for Cert. 1a. Moreover, in *Chandler*, the Eleventh Circuit recognized the distinct genesis and scope of a political candidate's First Amendment rights which are over and above any "rights" which Congress may have bestowed under the Federal Communications Act. *Chandler*, 917 F.2d at 489.[3]

III.

TRADITIONAL FORUM ANALYSIS ESTABLISHES THAT THE CONGRESSIONAL DEBATE WHICH AETC CHOSE TO SPONSOR CREATED A QUALIFIED FIRST AMENDMENT RIGHT OF ACCESS FOR MR. FORBES.

"The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educator's Assn.*, 460 U.S. 37, 44, 103 S. Ct. 948, 954 (1983). In *Perry* this Court specifically delineated three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.*

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3. Mr. Forbes suggests that some confusion as to the Eleventh Circuit's reasoning in arriving at its holding in *Chandler* is understandable given the peculiar circumstances under which that opinion was rendered. The published opinion reveals that the district court issued its temporary injunction on October 18, 1990, briefs were submitted to the circuit court on an expedited schedule, the case was argued on October 30, 1990 and the appellate opinion was issued the next day. The Eleventh Circuit itself characterizes its written opinion as "succinct". *Chandler, id.* at 488.

(*Citing Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449 (1985)).

A. Traditional Public Forum.

As recognized by the Eighth Circuit in this case, public television stations do not fit within the parameters of the traditional public forum. Access to the airwaves has not been "by long tradition or by government fiat devoted to assembly and debate" such as town squares and streets which have "immemorially been held in trust for the use of the public, and time out of mind, been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45, 103 S. Ct. at 955; *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515, 59 S. Ct. 954, 963 (1939).

B. Limited Public Forum.

The Eighth Circuit suggested that upon remand the finder of fact might conclude that AETC had created a so-called "limited public forum" when it decided to sponsor the political debate at issue in this case. Petition for Cert. 11a. However, the issue of whether a limited public forum existed raises an issue of fact and law which necessitates a hearing.

Limited public forums are places which have not been generally open for public expression but because the government has opened such places for use for free speech for only a limited period of time or purpose they become so designated. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655, 101 S. Ct. 2559, 2567 (1981). Limited public forums have been recognized by this Court in a variety of contexts. In *Heffron*, this Court recognized the Minnesota State Fair was a limited public forum because the fair existed to provide a means for a great number of exhibitors to temporarily present their

products or views, whatever their purpose, to a large number of people in an efficient manner. *Id.* Similarly, in the university context this Court recognized that the University of Missouri created a limited public forum by accommodating meetings of over one hundred student groups. *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). This Court in *Widmar* acknowledged that in creating a limited public forum the University "assumed an obligation to justify its discrimination and exclusions under applicable constitutional norms." *Id.* at 267.

In limited public forums, activities protected by the First Amendment are subject to reasonable time, place, and manner restrictions. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294 (1972). Such restrictions are permissible if they are "justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication." *Heffron*, 452 U.S. at 647, 101 S. Ct. at 2564 (*quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S. Ct. 1817, 1830 (1976)).

The Eighth Circuit correctly held that the determination of whether AETC (as a state actor) created a limited public forum should be reserved for the factfinder based upon greater evidentiary development. Consequently, it would be improper to summarily dismiss Mr. Forbes' lawsuit for failure to state a claim.

C. Nonpublic Forum.

Nonpublic forums have been identified by this Court as governmental property which is not usually compatible with expressive activity. Access to nonpublic forums may be restricted so long as the restrictions are reasonable and are not calculated to suppress expression merely because public officials oppose a particular speaker's view. *Kokinda*, 110 S. Ct. 3115; *Cornelius*,

473 U.S. at 799, 105 S. Ct. at 3447. In *Cornelius*, this Court observed that:

> Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum or if he is not a member of the class of speakers for whose especial benefit the forum was created, the governments violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. at 3451. (Citations omitted.)

The debate at issue in this case was held to benefit candidates for Arkansas' Third Congressional seat and was for the purpose of addressing the topic of who should be elected to that position. Petition for Cert. 12a. As a balloted Independent candidate, Mr. Forbes was a member of the class of speakers for whose especial benefit the debate was held and he wished to address the topic encompassed by the debate. *Id.* The Eighth Circuit correctly determined that, even if AETC did not create a limited public forum, its sponsorship of the debate created a nonpublic forum which carried with it minimal First Amendment protections.

Therefore, if AETC refused to include Mr. Forbes in the Congressional debate because of its objections to his viewpoint, AETC violated Mr. Forbes' First Amendment right of access. Furthermore, Mr. Forbes' remedy for a violation of his constitutional rights would be a suit in federal court, *not* an administrative procedure before the FCC. *Kokinda*, 110 S. Ct. 3115; *Perry*, 460 U.S. at 49, 103 S. Ct. at 957; *Cornelius*, 473 U.S. at 788, 105 S. Ct. at 3439; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714 (1974).

IV.

THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH PRECEDENT OF THIS COURT AND OTHER CIRCUITS.

As a fundamental premise to its position, AETC contends that the Eighth Circuit's forum analysis "departs sharply from the body of precedent" because it believes the First and Fourteenth Amendments simply don't apply to Mr. Forbes in this case. (*See* Petition for Cert. at 9). Further, AETC contends that to the extend the Eighth Circuit disagreed with that premise not only is it wrong it is in conflict with the Eleventh Circuit's decision in *Chandler.* (*See* Petition for Cert. at 7).

However, AETC's interpretation of *Chandler* is simply incorrect. In *Chandler,* Libertarian candidates for governor and lieutenant governor in Georgia sought to enjoin the Georgia Public Telecommunications Commission ("GPTC") which was an instrumentality of the State of Georgia from broadcasting a political debate between Democratic and Republican candidates for those offices without inclusion of those Libertarian candidates. *Chandler,* 917 F.2d at 488. GPTC denied the Libertarian candidates participation in the debates but offered each of them thirty minutes of air time to present their views. The candidates apparently rejected GPTC's substitute offer.

After an evidentiary hearing, the district court entered the temporary restraining order requested based upon First Amendment and Equal Protection grounds. *Chandler,* 917 F.2d at 491-92. On appeal, the Eleventh Circuit vacated the district court's restraining order and remanded the case for dismissal.

Contrary to AETC's contentions here, the Eleventh Circuit in *Chandler did* apply First Amendment analysis to the issue before

it. For example, the court stated, "[t]his court has held that the degree of control that a public broadcast licensee can exercise over its broadcast programing *consistent with the First Amendment* depends on the mission of the communicative activity being controlled." *Chandler,* 917 F.2d at 488 (*citing Schneider v. Indian River Community College Foundation, Inc.,* 875 F.2d 1537, 1541 (11th Cir. 1989)). (Emphasis added.) Furthermore, even though it held against the candidates, the Eleventh Circuit said "[w]ithout deciding, we can safely predict the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would *authorize judicial intervention to vindicate the First Amendment.*" *Chandler,* 917 F.2d at 489. (Emphasis added.)

The Eleventh Circuit's application of First Amendment principles in *Chandler* can be squared with its decision denying the excluded candidates' claim only by examining the *factual* findings of the court. The court first applied the holding of *Muir v. Alabama Educ. Television Comm'n,* 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied,* 460 U.S. 1023, 103 S. Ct. 1274, 75 L. Ed. 2d 495 (1983) to hold that CPTC's decision to broadcast a debate was not subject to First Amendment analysis.[4] *Chandler,* 917 F.2d at 488.

The Eleventh Circuit next made a finding that "a decision to air debates *between candidates of the major parties*" is a "content-based decision [that is] *not viewpoint restrictive* and *does not violate the First Amendment.*" *Chandler,* 917 F.2d at 489. (Emphasis added.) In view of the Eleventh Circuit's later statement that "the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment", *Chandler,* 917 F.2d at 489, it is apparent that the court's finding of an absence of

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4. *Muir* stands for the proposition that the decision *whether or not to broadcast* a particular program is a matter left to the publicly-owned licensee and is not subject to First Amendment scrutiny from the standpoint of viewers' rights.

viewpoint restriction was one of fact or a mixed question of fact and law and *not* a pure statement of law.

Mr. Forbes submits that the reference to "content" *must* refer to the topic or subject matter of the forum. Once the topic or subject matter has been specified by the state, then one can determine the common area of speech and class of speakers to be encompassed by the forum. Exclusion of *any* member of that class, must therefore be *necessarily* viewpoint-based and subject to First Amendment scrutiny. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2147-48 (1993).[5]

On the other hand, AETC would construe *Chandler* to say that there is a *per se* rule of law in the Eleventh Circuit that *any* decision by a publicly-owned broadcaster to exclude minority party candidates from a debate is beyond First Amendment scrutiny. However, in light of its decisions, the Eighth Circuit would examine the facts of each case to see whether or not the exclusion was viewpoint-neutral. In an attempt to overcome sound precedent, AETC is now flying this purported conflict as a banner to catch the eye of this Court.[6]

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5. To the extent that *Chandler* adopts a rule of law that exclusion of minor-party candidates is always viewpoint-neutral, Mr. Forbes submits *Chandler* was wrongly decided.

6. To adopt the *per se* rule championed by AETC "would allow a state-owned station to exclude all Republicans, or all Methodists, or all candidates with a certain point of view, except to the extent, if any, that the excluded candidates could obtain relief under the Communications Act." Petition for Cert. 10a.

Such a result would come squarely with AETC's goal of reserving unto itself "the legal capacity to exercise unfettered editorial judgment over programming." (Petition for Cert. at p. 24). Said differently, the First and Fourteenth Amendments would have no application in AETC's world unless and to the extent it could clothe *itself* in them and accrue some benefit from doing so.

There can be little doubt that if the evidence before it had been sufficient to persuade the *Chandler* court of an actual attempt by GPTC to restrict the Libertarian candidates' debate participation strictly on the basis of their opinions, the Eleventh Circuit would have enforced those candidates' First Amendment rights independently of any rights they may or may not have possessed under the Federal Communications Act. *Chandler,* 917 F.2d at 489. However, because it had held that GPTC had not violated the candidates' First Amendment rights the Eleventh Circuit summarily rejected the candidates' Fourteenth Amendment arguments stating that "[a]ppellees are not members of a protected class, and thus appellants need only exhibit a rational basis for their decisions. . . . As we determined above, appellants' decisions were rational, and we thus find no Equal Protection violation." *Chandler,* 917 F.2d at 489.

In this case, the Eighth Circuit's holding that First and Fourteenth Amendment protections were independent of those provided by the Federal Communications Act is consistent with precedent of this Court and other circuits, including the Eleventh Circuit's decision in *Chandler. See, e.g., United States v. Kokinda,* 110 S. Ct. 3115. Moreover, the Eighth Circuit would allow proof as to whether Mr. Forbes was a member of the class intended to be benefited by AETC's debate. The Eighth Circuit reasoned that Mr. Forbes' exclusion from the debate might have carried with it exclusion of his opinions. Thus, AETC's decision to exclude Mr. Forbes from the debate might be shown to have been motivated by its desire to prevent the broadcast of his views to the public. As a balloted candidate, Mr. Forbes was a member of the class of candidates eligible for voter consideration and for participation in the state-created forum AETC created.

To evaluate whether or not AETC had a sufficiently legitimate reason to exclude Mr. Forbes, the Eighth Circuit properly remanded the case to the district court for further factual

development. The issue presented to this Court is *not* whether Mr. Forbes has a meritorious claim, but whether the Eighth Circuit was correct in finding that he had stated a First Amendment claim sufficient to survive a motion to dismiss.

V.

THE EIGHTH CIRCUIT'S DECISION RETAINS JUSTIFIABLE FIRST AMENDMENT SCRUTINY FOR PUBLICLY-OWNED BROADCASTERS AND THUS WILL NOT UNNECESSARILY IMPINGE UPON THEIR EDITORIAL DISCRETION AND SHOULD NOT DEPRIVE THE PUBLIC OF COMPREHENSIVE POLITICAL DEBATES.

AETC asserts that if the exclusion of Mr. Forbes is subjected to First Amendment scrutiny then every programming judgment "on everything from art to zoology" will be vulnerable to court challenge as a viewpoint discriminatory decision. (*See* Petition for Cert. at 18.) However, the Eighth Circuit carefully limited its requirement of viewpoint-neutrality for editorial decisions to the political debate context, and so rebuttal of AETC's dire prediction is both unnecessary and unhelpful to resolution of the issue at hand. Petition for Cert. 12a, n. 4. To that extent AETC's Petition reveals an intention to cease programming political debates in the future because it must afford First Amendment rights to all balloted candidates, such a position would not seem to serve the public interest with which AETC is charged.

The Eighth Circuit addressed AETC's concerns regarding the impact of its decision by noting that its decision was in no way based upon the Fifth Circuit's opinion in *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d at 1033. *See* Petition for Cert. 12a, n. 4. *Muir* addressed the issue of whether individual viewers of public television stations could claim a First Amendment right to compel

the licensees to broadcast a previously scheduled program which the licensees decided to cancel. *Muir,* 688 F.2d at 1035. The Fifth Circuit concluded and the Eighth Circuit agreed that the viewers had no such First Amendment right of access to the public airwaves. *Id.* However, contrary to AETC's contention, the Eighth Circuit's decision in no way extends First Amendment rights of viewers to question programming decisions. The court's decision only addresses the First Amendment right of a speaker to address a topic encompassed within the purpose of the forum when the speaker is a member of the class for whose especial benefit the forum was created. *Cornelius,* 473 U.S. at 799, 105 S. Ct. at 3447.

VI.

THE EIGHTH CIRCUIT'S APPLICATION OF FIRST AMENDMENT PROTECTION TO THE CASE AT BAR FURTHERS IMPORTANT PUBLIC POLICY CONSIDERATIONS.

It is beyond cavil that the First Amendment is implicated whenever a public broadcast is made by either a privately-owned or a publicly-owned licensee. *Red Lion Broadcasting Co.,* 395 U.S. at 367, 89 S. Ct. at 1794. This Court has stated:

> *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.* . . . It is the purpose of the First Amendment to *preserve an uninhibited marketplace of ideas* in which truth will ultimately prevail, *rather than to countenance monopolization of the market, whether it be by the Government itself or a private licensee.* . . . *"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."* . . . It is the right of the public to

> receive *su[illegible]e access* to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right *may not constitutionally be abridged either by Congress or by the FCC.*

Id. at 390. (Emphasis added.)

To protect First Amendment rights, this Court has consistently asserted its commitment to the principle that "debate on public issues should be uninhibited, robust and wide open." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S. Ct. 3409, 3425 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 720-21 (1964). The necessity for public debate is perhaps most evident when impacting "the ability of the citizenry to make informed choices among candidates for office." *Kennedy for President Committee v. F.C.C.*, 636 F.2d 417, 420 (D. C. Cir. 1980) (*citing Buckley v. Valeo*, 424 U.S. 1, 14-15, 96 S. Ct. 612, 632 (1976)).

Despite the importance of freedom of speech, this Court has *never* held that the First Amendment guarantee gives one the right to communicate one's views at all times and in any manner that may be desired. *Cornelius*, 473 U.S. at 799, 105 S. Ct. at 3447. *See Heffron*, 452 U.S. at 647, 101 S. Ct. at 2563. Moreover, while acknowledging that the First Amendment guarantee has its fullest and most urgent application to the conduct of campaigns for political office, the District of Columbia Circuit held that this did not give any candidate a constitutional right to *compel* broadcast of his or her views. *Kennedy for President Committee*, 636 F.2d at 430 (*citing Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S. Ct. 621, 625 (1971)). However, when a forum is created by the state, certain rights are bestowed upon the people to participate in the debate and state-owned broadcasters are charged with the responsibility of ensuring that the people are given the right to access provided by the First and Fourteenth Amendments.

While publicly-owned broadcasters have the same rights and obligations to make free programming decisions as their private counterparts, as instruments of the State they do *not* have the protection of the First Amendment that their private counterparts enjoy. *Muir,* 688 F.2d at 1034.

It is the struggle to preserve the public's fundamental constitutional right to a free exchange of ideas and to be informed, particularly in matters of self-government, which requires First Amendment protection for political candidates in government-created fora such as that created by AETC. Any imposition on a publicly-owned broadcaster caused by inclusion in a public debate of balloted minor-party candidates is MORE than overweighed by the benefit to the public. The electorate is invigorated by hearing competing opinions, competing proposals to address weighty public concerns, and to otherwise be informed. In fact, it could be said that a First Amendment requirement of inclusion of all balloted candidates in a state-sponsored debate lies at the very heart of the rationale for broadcast licensing of the state in the first place. While *private* broadcasters can include and exclude candidates at will, *state-owned* broadcasters exist to fill a broader, non-profit public need, *i.e.,* the need for public-interest programming that *cannot be otherwise obtained* by the electorate.

Moreover, for a state-owned broadcaster to unilaterally decide which candidates are "serious" or to entrench the political parties it chooses is itself dangerous and undermines the entire democratic process. Petition for Cert. 5a. The fact that Mr. Forbes himself obtained a plurality in various state-wide elections, as well as the more recent presidential campaign of Mr. Ross Perot, in which he received some nineteen percent of the votes cast, reveals what some might describe as a desire on the part of the electorate to hear what minor-party candidates have to say. (*See* Petition for Cert. at 77a-78a.) More importantly, it demonstrates the need to secure First Amendment rights to minor-party candidates in state-

created fora so that the public interest will be better served consistent with the original purpose of the Bill of Rights.

In light of this Court's First Amendment jurisprudence, Mr. Forbes asserts that a *per se* rule, such as that proposed by Judge Clark in his dissent in *Chandler* to the effect that *all* balloted candidates must be included in a debate sponsored on publicly-owned broadcast facilities, is not only constitutionally warranted but also healthy for the country. *Chandler,* 917 F.2d at 490.

CONCLUSION

Contrary to AETC's contention, this is *not* a case wherein a political candidate is demanding access to broadcast facilities of a privately-owned broadcaster. Nor is it a case wherein a political candidate is demanding that a publicly-owned broadcaster program a debate against its will. Rather, this is a case regarding First Amendment protection for citizens in their access to state-sponsored fora.

The decision to sponsor a debate between Arkansas' Congressional candidates was made solely by AETC. Once decided, Mr. Forbes, who was a balloted Independent candidate, then came under the First Amendment's umbrella of protection within that state-created forum. Thus, the Eighth Circuit properly remanded the case for a determination of the reasons for AETC's exclusion of Mr. Forbes from the televised debate.

For the reasons stated above, the Respondent, Ralph Forbes, respectfully requests that AETC's Petition for Certiorari be denied.

Respectfully submitted,

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